IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.3 OF 2007.

Thomas Cook (India) Ltd.,
a Company incorporated under
the Companies Act, 1956 with
its office at Dr. D. N. Road, .. Petitioner.
Fort, Mumbai, 400 001. (Original Defendant No.1)

Versus

1. M/s.Beach Ark Hotels Pvt. Ltd.
A Company incorporated under
the Companies Act, 1956 with its
Registered office at Teen Murti,
Fatrade Beach, Varca, Salcete, .. Respondent No.1
Goa. (Original Plaintiff)

2. M/s. J. M. C. Holidays Ltd.
Devonshire House, 29/31,
Elmfield Road, Bromley .. Respondent No.2
Kent BR1 1LJ, J.K. (Original Deft. No.2.)

Mr. M. S. Usgaonkar, Sr. Advocate with Sudesh Usgaonkar, Advocate for the applicant.

Mr. F. M. Reis, Advocate for the respondent No.1.

Mr. M. S. Joshi, Advocate for the respondent No.2.

Coram :- **R. S. MOHITE, J.**

Date : - 28 th September, 2007.

ORAL JUDGMENT :

This is an application filed by the applicant M/s. Thomas Cook (India) Ltd. impugning an order passed by the Second Additional Civil Judge, S.D., Margaon on 31.1.2007 below Exh.32 in Spl.C.A. No.101/2003/II. By the impugned judgment and order the trial Court

has dismissed the application at Exh.32 which was preferred by the present petitioner who was defendant No.1 in the aforesaid Special Civil Suit. The said application at Exh.32 was preferred by the present petitioner U/s.8 of the Arbitration Act, 1996 and was for a prayer that dispute in the suit between the plaintiff and defendant No.1 be referred to arbitration by or any person to be appointed in that regard by the managing director of the defendant No.1.

The brief facts out of which the present C.R.A. Arise are as under :

A) That the plaintiff is the owner of Resort known as 'Resorte de Goa' situated in survey No.162 of village Varca.

B) By an agreement dated 13th December, 2000, which according the plaintiff is a tripartite agreement between the plaintiff, defendant No.2 J.M.F. Holidays Ltd. and T.C.I., it was agreed that the rooms of the resort of the plaintiff would be booked for occupation by defendant No.2 i.e. J.M.C. Holidays Ltd. and the said T.C.I. for two successive tourist seasons for use by foreign tourists. This agreement did not contain any arbitration clause. Under the said agreement the defendant No.2 J.M.C. Holidays Ltd. along with the said T.C.I. deposited with the plaintiff, advance towards room charges of Rs. 2 Crores and 7 Lacs and the agreement further provided for the modalities of adjustment of repayment of the said amount. The agreement contemplated that the said amount would be liquidated by 30.4.2003. The defendant No.2 J.M.C. Holidays Ltd. was a Company operating in the United Kingdom and T.C.I. was the then handling agent of defendant No.2.

C) In due course of time, the defendant No.2 J.M.C. Holidays Ltd.

changed their handling agent and appointed the defendant No.1 Thomas Cook (India) Ltd. as their handling agent.

D) Pursuant to being appointed as handling agent of defendant No.2, the defendant No.1 entered into a separate agreement with the plaintiff styled as "Agreement for Hotel Contract". Under this agreement the defendant No.1 as the new handling agent of defendant No.2 deposited a refundable interest free sum of Rs.1 Crore and 7 Lacs with the plaintiff. The plaintiff agreed to comply with all the terms and conditions of the contract and clause I of this agreement contained details about the manner in which the deposits and repayments were to be made. Clause 4 of this agreement pertained to dispute resolution and contained an arbitration clause. The facts indicate that the defendant No.2, could not supply the tourists and hence, the plaintiff felt he was entitled to damages. Accordingly, on 4th September, 2003, the plaintiff filed a suit claiming damages for breach of contract. The said suit being Spl.C.S. No. 101/2003/II was for the following main prayers.

a) That the defendants be ordered and decreed to pay to the plaintiffs jointly and severally the said sum of Rs. 2,70,37,125/- with further interest thereon @ 10 % p.a. From the date of the filing of the suit upto actual payment, and in the alternative;

b) It be declared that the plaintiffs are entitled to set-off the said sum of Rs.2,70,37,125/- from the amount outstanding in the said advance given by the defendants and the defendants be ordered and decreed to pay jointly and severally the deficit amount with further interest thereon @ 10% p.a. From the date of the filing of the suit upto actual payment.

E) In this suit, on behalf of defendant No.1, a written statement

came to be filed and in the first paragraph defendant No.1 raised a preliminary objection to the effect that under clause 4 of the contract dated 22.5.2001,the plaintiff and defendant No.1 had agreed that any dispute or difference of whatsoever nature should be referred to arbitration. The objection was that in view of the said arbitration clause, the Civil Court lacked jurisdiction to try and entertain the suit.

F) On 7.8.2006 a separate application was preferred by defendant No.1 for referring the dispute in the suit between the plaintiff and defendant No.1 to arbitration by or by any person to be appointed in that regard by the managing director of the defendant No.1. This application was opposed by a say given by the plaintiffs in October, 2006 in which they contended that the application was not maintainable as it was an afterthought and not filed within the time as required by law. It was also contended that there was no arbitration agreement between the plaintiff and defendant No.2. The impugned order was passed by the trial Court on 31.1.2007. The trial Court, for the reasons mentioned in the order, was pleased to reject the application preferred by the defendant No.1 U/s.8of the Arbitration and Conciliation Act, 1996. This is how, the present revision application is came to be filed before this Court.

G) On perusing the record, I find that prayer (a) in the suit of the plaintiff is clearly a prayer for damages. Mr. Reis, Advocate appearing for the plaintiff contended that the damages were claimed under General Law for breach of contract. According to him, the contract dated 13th December, 2000 must be read in conjunction with the contract dated 22nd May, 2001.

H) I find from the record that in this case, the defendant No.2

J.M.C.Holidays Ltd., U.K. Is the principal and if at all the plaintiff succeeds in securing damages, the liability to pay such damages would be for the breach of main contract dated 13th December, 2000. The aforesaid contract contains no arbitration clause. The present defendant No.1 was admittedly not a signatory to that contract. T.C.I., who according to the plaintiff, was signatory to that contract, is not party to the suit. In so far as the present defendant No.1 is concerned, they would come into the picture as the plaintiff also claimed set-off against the claim of Rs.2,70,37,125/- by way of damages, from the amount outstanding in the advance given by the defendants. This would include the amount of outstanding from the refundable interest free sum of Rs. 1 Crore and 7 Lacs which was deposited by the defendant No.1 under the "Agreement for Hotel Contract" dated 22nd May, 2001. The cause of action in the suit therefore, encompasses the rights claimed by the plaintiff under two separate agreement i.e. agreement dated 13th December, 2000 being an agreement in which there is no arbitration clause and to which the present defendant No.1 is not a signatory as well as an agreement dated 22.5.2001 which is between the plaintiff and defendant No.1.

I) The prayer made by the defendant No.1 in his application however, is limited in referring only the dispute between the plaintiff and defendant No.1 to arbitration. It was not prayed that the entire dispute covered by the suit be referred to arbitration. Such referring of a part of the dispute to arbitration is now no longer permissible in law. This issue is not res-integra and is covered by judgment of Apex Court in the case of Sukanya Holding Pvt. Ltd. Versus Jayesh H. Pandya and another, reported in AIR 2003, S.C. 2252. The relevant proposition of law was laid down in paragraphs No.13, 14, 15, 16 & 17 which are reproduced herein below.

"13. There is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes., the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

14. There is no provision- as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under S.24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the Court may refer the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. Section also provided that the suit would continue so far as it related to parties who have not joined in such application."

15. The relevant language used in S.8 is - "in a matter which is the subject matter of an arbitration agreement." Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of S.8. The words 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement.

16. The next question which requires

consideration is – even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section8 of the Act ? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say that subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

17. Such bifurcation of suit in two parts,one to be decided by the arbitral tribunal and other to be decided by the civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

The aforesaid judgment clearly laid down the bifurcation of suit in two part, one to be decided by the arbitral tribunal and other to be decided by Civil Court would inevitably delay the proceeding and increase the cost of litigation and harassment to the parties and create occasions where there would be a possibility of conflict the judgment and orders by two different forums. I, therefore, hold that the bifurcation of the

subject matter of action brought before the judicial authority is not permissible in law.

In the aforesaid position of law, in my view, the trial court was legally correct in not allowing the application U/s.8 filed by the defendant No.1. In view of this finding it is not necessary to go into the other issues. The C.R.A. is therefore, dismissed.

It appears from the record that the suit has been stayed and not proceeded in view of stay order passed by this Court. In this view of the matter, suit is expedited. It may be mentioned here that in so far as the dispute raised by the defendant No.1 against the plaintiff, basing their claims solely on the basis of agreement dated 22.5.2001, the issue has been referred to the arbitrator.

R. S. MOHITE, J.

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